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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1105

JOSEPH CLINTON McBRIDE,

Petitioner,

—against—

WILLARD SMITH, Commandant, United States Coast Guard,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered November 23, 1966. Such judgment affirmed the denial of petitioner's motion for summary judgment and the dismissal of his complaint. The complaint alleged that the refusal of respondent, the Commandant of the United States Coast Guard (the "Commandant"), to validate petitioner's merchant mariner's document denied rights guaranteed by the United States Constitution and was not authorized by statute.

Citations to Opinions Below

The opinion of the District Court is reported at 248 F. Supp. 459 and is printed in Appendix A, page 1a. The opinion of the Court of Appeals is reported at 369 F. 2d 65 and is printed in Appendix B, p. 25a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1964).

Questions Presented for Review

1. Whether the refusal of the Commandant to issue a validated merchant mariner's document required for employment on United States merchant vessels deprives the applicant of liberty and property without due process of law, in violation of the Fifth Amendment, and abridges freedoms protected by the First Amendment, where the Commandant's decision is based upon the applicant's beliefs and associations and

(a) the applicant's participation in Communist Party activities is limited to activities in support of the Party's lawful objectives;

(b) there is no evidence (apart from participation in these activities) showing that he had a specific intent to advance illegal objectives of the Party or had beliefs that might lead him to engage in espionage or sabotage.

2. The regulations setting forth the criteria for determining whether a specially validated merchant mariner's document shall be issued require the Commandant to determine whether he is satisfied that the applicant's presence on shipboard would not be "inimical" to the security of the United States. The Commandant is required to base his determination on five kinds of information, only one of which—membership in or "sympathetic association" with

organizations on the Attorney General's list of subversive organizations—is present in this case. Are these regulations unconstitutionally vague under the Fifth Amendment,

(a) because of the uncertainty inherent in the basic standard,

(b) because of their failure to provide criteria for determining when an applicant's relation to a listed organization requires denial of a merchant mariner's document, and

(c) because they direct the Commandant to consider not simply membership but also "sympathetic association" with listed organizations?

3. Whether by enacting the Magnuson Act, which gives the President general authority to issue "rules and regulations" to safeguard vessels, harbors, ports and waterfront facilities against injury "from sabotage or other subversive acts, accidents, or other causes of a similar nature" but which contains no reference to a screening program, Congress authorized the creation of a screening program which

(a) restricts an individual's liberty and brands him a security risk on the basis of his beliefs and associations; and

(b) employs procedures which depart in several significant respects from traditional norms of fair procedure.

Constitutional Provisions, Statutes and Regulations Involved

The First Amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of

grievances." The Fifth Amendment provides: "No person shall . . . be deprived of . . . liberty, or property, without due process of law. . . ."

The statute involved is the Magnuson Act, 64 Stat. 427 (1950), 50 U. S. C. § 191 (1964). The regulations involved are 33 C. F. R. §§ 6.10-1, 6.10-3, 6.10-9 and 121.01 through 121.29. The statute and regulations cited above are set forth in Appendix C, p. 33a.

Statement of the Case

Petitioner, a merchant seaman, on July 10, 1959 applied to the Commandant for special validation of his merchant mariner's document (R. 348; J.A. 117a).* Coast Guard Regulations require the possession of a specially validated mariner's document as a condition for employment on a merchant vessel of the United States of 100 gross tons or more. 33 C. F. R. § 121.01(a).

On October 15, 1959, without issuing the special validation, the Commandant sent petitioner twenty-four interrogatories (R. 352-55) relating, *inter alia,* to membership in and political activities on behalf of the Communist Party. On March 29, 1960 petitioner submitted his answers (R. 357-61, J.A. 124a-128a).

Thereafter on November 23, 1960, the Commandant denied the application because he was not (R. 341; J.A. 107a):

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* "R" refers to pages in the record below. "J.A." refers to pages in the Joint Appendix.

"... satisfied that your character and habits of life are such as to warrant the belief that your presence on board vessels of the United States would not be inimical to the security of the United States."

On December 22, 1960 petitioner answered and requested a hearing (R. 346-47; J.A. 113a-15a).

Thereafter, on November 28, 1962 and May 14, 1963, a hearing was held before the Hearing Board of the Third Coast Guard District. The Board was composed of a representative of the Coast Guard (who served as chairman), a management representative, and a labor representative—each of whom was designated by the Commandant* (33 C. F. R. § 121.13; R. 241, 328). Early in the hearing, petitioner's counsel objected to the proceedings on the grounds that they were not authorized by statute and that they violated petitioner's constitutional rights (R. 254).

The Government's principal witness was John Lautner, a member of the Communist Party from 1929 to 1950 (R. 263; J.A. 39a), who had testified about the affairs of the Communist Party "at about 90 cases, procedures, hearings involving Communism and 20 Smith Act cases" (R. 267; J.A. 45a). Lautner had served prior to 1950 as a member of the National Review Commission of the Party which had charge of maintaining Party discipline (R. 261, 263; J.A. 36a, 39a) and as security officer of 35 East 12th Street (R. 261; J.A. 36a), the building which formerly housed the National, State and County headquarters of

* The management and labor representatives are chosen by the Commandant from panels of persons named by the Secretary of Labor to represent management and labor respectively. 33 C. F. R. § 121.13.

the Communist Party (R. 260; J.A. 35a). He identified petitioner as "the elevator man" at this building (R. 260; J.A. 35a). Lautner testified that to hold his position as elevator operator petitioner would have to have been "checked out" as a Party member, but conceded that he had "no personal knowledge" whether petitioner was a member (R. 261-62; J.A. 37a). Lautner left the building in January, 1950 and never saw the petitioner there at any time thereafter (R. 262; J.A. 38a).

Lautner testified that petitioner was a "manual worker," a "rank-and-filer," not a "party functionary" (R. 263-64; J.A. 40a). He testified that as a "rank-and-filer" petitioner's normal activities would be to "Attend branch meetings, pay duties [sic], accept assignments and make reports of assignments" (R. 264; J.A. 40a). While he disclaimed any knowledge of the particular activities of petitioner's branch, he stated that branch assignments were peaceable actions of the organization designed to recruit members into the Party (R. 264; J.A. 41a).

Lautner further testified that branch activities did not include "efforts to commit espionage, sabotage or other crimes" (R. 264; J.A. 41a). He added (*ibid.*):

> "On the basis of my experience, that was completely separate and apart from the political structure of the Communist Party. I think it would be foolish on the part of the party to concern itself with that type of activity and jeopardize the status of the party. That was something separate and apart from the Communist Party organization."

Lautner also testified as to the Communist Party's position on Negro rights. He stated that it took a strong posi-

tion against racial discrimination and that he "often wonder[ed] why the Party failed to attract Negroes in the ranks of the Party" (R. 272; J.A. 51a). He thought the explanation was that "Negro people are religious people. They're beyond Marxism". (*ibid.*). He stated that the Party's activity in the Negro rights area had declined in the 1950's due to the attacks on the Party, but that a rank-and-file Negro member might infer that the reason for the decline was a lack of interest in racial discrimination (R. 273; J.A. 52a).

Lautner testified that Camp Midvale was a "Communist front" and that Wingdale Lodge was a "party camp" with "the proceeds or profit" going to the Communist Party. Camp Midvale, he stated, was a summer camp "for Party people sympathizers or anyone that wanted to go out there" (R. 273; J.A. 53a). He had never attended Camp Midvale and consequently did not know what went on there (R. 274; J.A. 54a). He stated that at Wingdale Lodge, also known as Camp Unity, there were lectures on the Communist point of view and Party literature was sold (*ibid.*).

A second Government witness,* Fenton Thomas Scholl, an agent of the Federal Bureau of Investigation, testified that he had interviewed petitioner on two occasions in 1961 (R. 275; J.A. 56a). Scholl tesitfied that petitioner had admitted that he was a former member of the Communist Party and had attended Party meetings in various apartments in the late 40's and early 50's (R. 276; J.A. 57a). He stated that petitioner had given as his reason for joining that he believed the Party to be an "organization which

* There was one other Government witness, Frank Ernest Borzage (R. 255-59), who was called to lay the foundation for the admission of Gov. Exs. F, G, H and I (R. 362-69).

would help the Negro race" (R. 276; J.A. 57a) and that petitioner had said he had quit the Party about 1957 "realizing that they were not to help the Negro race" (R. 276; J.A. 57a). Scholl added that he had "no personal knowledge that he has been a member since that time" (R. 278; J.A. 60a).

The remainder of the Government's case consisted of various exhibits. Among these exhibits were photostatic copies of pages from the Kings County and New York County Register of Voters for various years to show petitioner's registration as a member of the American Labor Party (R. 362-69); photostatic copies of nominating petitions to show that petitioner signed nominating petitions for Communist Party and Peoples Rights Party candidates (R. 370-72); and a photostatic copy of pages from the Guide to Subversive Organizations and The Attorney-General's List of Subversive Organizations to show the allegedly subversive nature of the May Day parade in New York City, the International Workers Order, the National Negro Labor Council and Wingdale Lodge (R. 281, 373-78).

The Government also introduced the questionnaire filed with petitioner's application and the answers to interrogatories, previously referred to (R. 348-50a, 356-61; J.A. 117a-22a, 125a-29a). The former disclosed petitioner's membership in the International Workers Order (R. 350a; J.A. 121a). In the latter petitioner admitted that he had been a member of the Communist Party, had signed a Communist Party nominating petition, had attended various Communist Party conventions in 1957, had participated in May Day parades in 1951 and 1952, had participated in a Communist Party election campaign in 1942, had been present at Camp Unity on the Labor Day weekend in 1946 and in the summer

of 1952, had been present at Camp Midvale in 1955, had participated in raising funds for the defense of Ferdinand C. Smith in 1948, had registered his affiliation with the American Labor Party from 1949 through 1954 and had signed an American Labor Party nominating petition in 1951, had signed nominating petitions for Peoples Rights Party candidates, had authorized use of his name in an amicus brief in connection with an appeal by Morton Sobel from his conviction for conspiracy to commit espionage, and had been employed from 1948 through 1959 by the 1213 Realty Corp., 35 East 12th Street, New York City (R. 356-61; J.A. 124a-29a).

Appellant took the stand and testified under oath that he was born in Paradise, Florida, on May 31, 1911, one of ten children (R. 304; J.A. 79a). His parents were turpentine workers and migratory farm laborers. For the first 17 years of his life he lived in conditions that he described as "chattel slavery" (R. 305-06; J.A. 81a). His only education in Florida was about three years at a biblical school where "They had a biblical minister who would read the bible to you" (R. 305; J.A. 80a). There was no "reading or writing or that sort of thing" (*ibid.*). After some traveling and working as a migratory farm worker he moved to New York in 1932 (R. 305-06; J.A. 81a).

In 1936 petitioner joined the Communist Party (R. 307; J.A. 82a). He explained the circumstances of his joining as follows (*ibid.*):

> "I know very well how it happened. The first time I heard about the Communists they were supposed to help the cause of the Negro. They were supposed to help the cause of the Negro. They were supposed to represent a kid on Eastern Parkway in Brooklyn, and

these people had a commission to get legal advice, a defense for this man. I never knew the man, but the white people were supposed to help the rights of the Negro. So that I hung around with these people for two or three months, never even knowing who the Communists were. I thought the Negroes spoke a foreign language to me because I didn't understand them. And there was a girl there with a white sheet, and I recall that she was moving around saying that we have to help the Negro. That is why I joined."

He testified that he left the Party in 1957 because he had discovered as he had grown older that the Party had done nothing to defend the rights of the Negro people (R. 307, 308; J.A. 83a). He added that he had found that the Communist Party discriminated against Negroes themselves (R. 317; J.A. 93a). Petitioner testified that after leaving the Party he had attended NAACP and CORE meetings and made donations (R. 323; J.A. 99a).

He stated that when he left the Party, so far as he was aware, only his local branch knew that he had stopped being a member (R. 314; J.A. 90a). He testified that he had not attended any Party meetings since leaving the Party or associated with any members of the Party other than some who had left the Party before he did (R. 315-16; J.A. 91a).

Petitioner described his Party activities as consisting of (R. 307; J.A. 83a):

"General political work, picketing, passing out leaflets, selling the Daily Worker, worked at rallies, setting up chairs, laying out tables and all that sort of thing."

He denied having ever engaged in espionage, sabotage or any other form of unlawful or violent activity on behalf of the Party (R. 307-08; J.A. 83a). Petitioner further denied knowing of any acts of espionage or sabotage engaged in by the Communist Party during the time he was a member (R. 308; J.A. 83a). Although he did state that he learned that the Communist Party advocated the overthrow of the present form of government, he did not concede that he would, while he was a member, have participated in a revolution (R. 312; J.A. 88a). He strongly affirmed, however, that he would now fight against the Communists (*ibid.*). He stated that he did not know of and did not participate in efforts by Communist leaders to interfere with shipping in the early days of World War II (R. 312-13; J.A. 89a). He further declared that if he had been told to commit sabotage " . . . I wouldn't have joined the party. I wouldn't do it" (R. 324; J.A. 100a).

Regarding his employment as an elevator operator petitioner testified that he got the job in 1948 in answer to an ad in the paper and worked there until August 4, 1960 (R. 313-14; J.A. 89a). He also stated that he had been employed for two months in 1950 by the Communist Party in organizing a peace demonstration (R. 322; J.A. 97a), and in 1954 or 1955 had gone to a picnic at Camp Midvale (R. 317; J.A. 93a).

Petitioner further testified that he learned to read and write from a member of the Party after he joined (R. 309, 320; J.A. 84a, 96a), and that in the process of learning to read and write, he took a course at the Jefferson School for a period of four or five weeks on "the principles of Marxism and Leninism and the Negro question. . . ." (R. 309, 310; J.A. 84a, 85a). He stated that he was taught

that full citizenship for the American Negro could be accomplished by Negroes and Whites fighting for legislation giving equal rights to Negroes and Whites (R. 309-10; J.A. 85a). When asked whether he was required to learn the principles of Marxism he responded (R. 310; J.A. 86a):

> "If I could absorb Marxism or Leninism I wouldn't be with people of my calibre. Why, I couldn't even pronounce the names that were mentioned or read to us by some one in the study group and explained to us."

Petitioner testified that no revolutionary tactics were taught him at the Jefferson School (R. 322; J.A. 98a).

When questioned further concerning the principles of Marxism, petitioner emphasized that he did not understand the meaning of it. He equated Marxism with the "Equality of man" and said he had been taught that "the capitalistic system was dying" and that "there would be a bloodless revolution" (R. 318; J.A. 94a). He added (*ibid.*): "I'm not familiar with Marxism and Leninism. All I was interested in was in the equality of man."

He stated that he had taken the same position as others in the group regarding the Korean War, that is that the American people ". . . should not get involved in another war," but that he now saw things differently (R. 319; J.A. 94a-95a).

Finally, petitioner expressly affirmed that his only loyalty today was "To the United States" (R. 323; J.A. 99a).

Petitioner called two witnesses on his behalf. The first, Miss Patricia Buitoni, stated that she had known petitioner since 1947, that she knew he had been a member of the Communist Party and believed he had joined because

he thought the Party "did fight for Negro rights. . . ." (R. 287-88; J.A. 63a). She stated that so far as she knew this was his only interest in the Party (R. 288; J.A. 63a). She confirmed that petitioner had left the Party in 1957 because he had come to realize that the Party was not fighting for Negro rights—and that they never had (R. 292; J.A. 67a). She further confirmed that his present associates were not Party members (R. 293; J.A. 67a-68a). She stated that she had never known petitioner to commit a crime, that his reputation in the community was good and that "He certainly doesn't have any loyalty to anything else but the United States" (R. 288; J.A. 63a). Miss Buitoni stated that she had attended May Day parades and had visited the Harlem Communist Party Headquarters but that she was not a member of the Communist Party and had not attended Party meetings (R. 290-91, 294; J.A. 64a, 68a).

Petitioner's second witness was Mr. Ed Woodhead, a bookstore employee. He stated that he had known petitioner for three years and that he had met him frequently during that time (R. 295; J.A. 70a). Mr. Woodhead, who is white, testified that he had also been born and raised in the part of Florida where plaintiff spent his early life (R. 296-97; J.A. 71a-72a). He described the conditions for a Negro there at that time as "abysmal" (R. 298; J.A. 73a) and stated that he believed petitioner had joined the Communist Party because it seemed to offer an answer for the discrimination he found both in Florida and, to a degree, in the North (R. 296; J.A. 71a). He thought petitioner had left the Party because of "general disenchantment" and because he had come to feel that non-communist organizations such as the NAACP and CORE might have a better

answer to the race problem (R. 299, 303; J.A. 75a, 77a). He further testified that petitioner was regarded in the community as "a good wholesome patriotic citizen," not a "wide-eyed radical" (R. 298-99; J.A. 74a), and that he had never known petitioner to be involved in any espionage or sabotage, but only in activities "devoted entirely to internal United States politics, with the primary objective of racial equality" (R. 299; J.A. 74a). He concluded that he could not imagine petitioner performing any act inimical to the interest of the United States, and that, in his opinion, petitioner was completely loyal (R. 299; J.A. 75a).

On July 2, 1963 the Hearing Board recommended to the Commandant that petitioner not be issued a validated merchant mariner's document (R. 388-412). Its report to the Commandant made 25 findings of fact and included an extensive resume and analysis of the evidence. Petitioner was not furnished a copy of the recommendation nor was he informed of any decision of the Hearing Board until the Government filed the Board's recommendation with the district court as part of the administrative record.

Without any opportunity for the submission of briefs to or oral argument before the Commandant, the Commandant, on October 14, 1963, notified petitioner that his application was denied (R. 231-33; J.A. 29a-34a). The findings of the Commandant in support of his conclusion were as follows (R. 231-33; J.A. 29a-34a):

> "1. You were, from 1936 until a date no earlier than 1957, a member of the Communist Party which has been designated by the Attorney General, pursuant to Executive Order 10450, as amended.

"2. For more than twenty years, beginning in 1936 when you joined the Communist Party, you were knowingly and sympathetically associated and affiliated with the Communist Party as demonstrated by your active participation in the Communist Party and in Communist Party-inspired organizations and activities:

"(a) In the late 1930's you attended a school which in your testimony you identified as 'the Daily Worker School known as the Jefferson School' and which you admitted was maintained by the Communist Party, and where you were taught the principles of Marxism and Leninism.

"(b) You signed a Communist Party nominating petition in 1939 and participated in the 1942 Communist Party election campaign.

"(c) In 1946 and 1952 you attended Camp Unity Wingdale, N. Y., a Communist Party enterprise with proceeds or profits going to the New York State Office of the Communist Party, and where Communist Party literature was sold and distributed and those in attendance were indoctrinated with the philosophy of the Communist Party. In 1955 you attended the same Camp then operating under the name Wingdale Lodge.

"(d) In 1955, you were present at Camp Midvale, N. J., which was attended by sympathizers of the Communist Party.

"(e) You assisted for two months in organizing the 1950 May Day Parade, New York City, and participated in the 1951 and 1952 Parades.

"(f) In the years 1949 through 1954, you registered voting affiliation with the American Labor Party in Manhattan, and in 1951 you signed an American Labor Party nominating petition.

"(g) In 1957, you signed a People's Rights Party nominating petition for Elizabeth Gurley Flynn, a candidate for public office of the City Council, Borough of Manhattan. Elizabeth Gurley Flynn was convicted of conspiracy to violate the Smith Act of 1940 in the United States District Court (S. D. N. Y.) on 21 January, 1953.

"(h) From 1941 until its dissolution in August 1954, you were a member, and attended meetings, of the International Workers Order, which has been designated by the Attorney General, pursuant to Executive Order 10450.

"(i) You attended, in 1957, the New York State Communist Party Convention, the Communist Party National Convention and various other Communist Party Conventions.

"(j) You were a member of the East Side Branch, New York City, of the Communist Party, and in the late 1940's and early 1950's you attended meetings of the Branch; on behalf of the Communist Party you did engage, in your own words 'in general political activity, picket, hand out literature, sell the Daily Worker, and work at rallies'. The Daily Worker was the chief journalistic mouthpiece of the Communist Party.

"3. You claim to have left the Communist Party in 1957. However, the record establishes that after that

date your activities were such as to support the conclusion that you continued to be a member of, or knowingly and sympathetically associated and affiliated with, the Communist Party. From 1943 until 1960, you were employed at 35 East 12th Street, New York City, at which address were housed the Headquarters for the National Committee, and the State and County Headquarters, of the Communist Party, the Daily Worker, the Freiheit (a Communist publication), and the warehouse for pictures and literature of the Communist Party. The record contains credible testimony that such employment would not have been available to a former Communist who had broken with the Communist Party.

"4. Your conduct as above described indicates that you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of government in the United States by force and violence and Communist domination of the world.

"5. During the course of the Hearing you testified that you joined the Communist Party because you had heard that the Communists would help the cause of the Negro. Your testimony that in the 1940's and again in 1951 you became disillusioned with the Communist Party because you felt 'they were not alert and on the ball on the Negro question' is negated by your continued association with and participation in the Communist Party and its activities long afterwards."

Pursuant to 33 C. F. R. § 121.23, petitioner took an appeal from the Commandant's decision to a board composed of a

representative of management, a representative of labor and presided over by a representative of the Coast Guard, in this instance an officer in the Coast Guard (R. 417, 421-22).* On February 20, 1964, the Appeal Board sent its recommendation to the Commandant that the appeal be denied (R. 413-415). No copy of the recommendation was furnished petitioner nor was he afforded an opportunity to submit arguments to the Commandant.

On March 3, 1964, the Commandant informed petitioner that after reviewing the recommendation of the Appeal Board he had "affirmed" his decision of October 14, 1963 refusing to issue a validated document (R. 235; J.A. 34a).

Having exhausted his administrative remedies, petitioner filed a complaint in the United States District Court for the Southern District of New York on May 15, 1964 (R. 1-30). The complaint was grounded on the First, Fifth and Sixth Amendments to the United States Constitution, 50 U. S. C. § 191 (the Magnuson Act), and 28 U. S. C. §§ 1331 and 2201 and prayed for a judgment declaring that the Commandant's acts were unconstitutional, an injunction against carrying out his decision and interfering with petitioner's employment, and a court order directing the Commandant to approve the application for validation endorsement (R. 11-12). On August 3, 1964 the Commandant answered, denying the essential allegations of the complaint (R. 31-33).

Thereafter, on May 14, 1965, petitioner moved for summary judgment under Rule 56, F. R. Civ. P. (R. 34). On December 15, 1965, the District Court denied petitioner's

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* The members of the Appeal Board, like the members of the Hearing Board, were designated by the Commandant as provided in 33 C. F. R. § 121.23(a).

motion for summary judgment and entered judgment dismissing the complaint (R. 227; J.A. 27a).

On January 20, 1966 petitioner, pursuant to 28 U. S. C. § 1291 (1964), appealed to the United States Court of Appeals for the Second Circuit.

On November 23, 1966 the Court of Appeals affirmed, holding that:

> (1) as interpreted and applied the regulations were not unreasonable (365 F.2d at 68-69);
>
> (2) the evidence supported the Commandant's finding that petitioner "fully realized, accepted, and approved" the objectives of the Communist Party, including the violent overthrow of the United States Government (365 F.2d at 68);
>
> (3) as construed by the Commandant to require "knowing" membership, 33 C. F. R. § 121.03(e) was not unconstitutionally vague (365 F.2d at 69);
>
> (4) the screening program was authorized by the Magnuson Act (365 F.2d at 69).

The Court distinguished *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), on the ground that it involved the "interpretation of criminal statutes, and the specific intent necessary for a constitutionally based conviction" while the issue in the instant case was one of "the reasonableness of regulation of employment in a peculiarly sensitive area. . . ." (365 F.2d at 68).

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal constitutional and statutory law which should be settled by this Court.

I

This case presents important unresolved constitutional issues as to the nature of the evidence required to justify the exclusion of an individual from his chosen occupation because of his beliefs and organizational activities.

By refusing to validate petitioner's merchant mariner's document, the Commandant has deprived petitioner of the opportunity to engage in his chosen occupation on all American vessels of 100 gross tons or more. 33 C. F. R. § 121.01 (a). The facts relied upon by the Commandant (R. 231-33; J.A. 29a-33a) involved, without exception, petitioner's exercise of his First Amendment rights. As this Court has repeatedly recognized, exclusion from a profession or trade because of beliefs and associations tends to discourage the exercise of these constitutional rights. E.g., *Keyishian* v. *Board of Regents*, —— U. S. ——, 35 U. S. L. Week 4152, 4157 (Jan. 23, 1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).

Statutes and regulations which deny employment to knowing members of the Communist Party, without any showing of a specific intent to further the Party's unlawful aims, unconstitutionally abridge the freedom of association guaranteed by the First Amendment. *Keyishian* v.

Board of Regents, —— U. S. ——, 35 U. S. L. Week 4152 (Jan. 23, 1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). Since an organization may embrace both legal and illegal aims a law not restricted to those having the specific illegal intent infringes unnecessarily on protected freedoms. As this Court declared in *Elfbrandt* v. *Russell,* 384 U. S. at 17, in language no less pertinent to employment in the merchant marine:

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."

To deny applicants the opportunity for employment on United States merchant vessels because of Communist Party membership and activities, in the absence of evidence of either (a) specific intent to further the illegal objectives of the Communist Party, or (b) actual participation in the Party's illegal activities, raises an equally serious constitutional question. The court below held that the evidence supported the Commandant's finding that "you were well indoctrinated in and fully realized, accepted, and approved the aims and objectives of the Communist Party, including the overthrow of the present form of government in the United States by force and violence and Communist domination of the World." 369 F. 2d at 68. There is, however, no difference for constitutional purposes "... between a disqualification under an unconstitutional standard and a disqualification which, although under color of a proper standard, is alleged to violate the First Amendment." *Bond* v. *Floyd,* 385 U. S. 116, 131 (1966).

The evidence relied upon both by the court below and by the Commandant relates almost entirely to petitioner's involvement in the lawful activities of the Communist Party.

1. *Petitioner's Communist Party membership and activities.* That petitioner was a rank-and-file member of the Communist Party from 1936 until 1957, and worked as an elevator operator in the building in which the Party's offices were located from 1948 until 1960, is undisputed. There is also no question but that he engaged in various lawful and constitutionally protected activities on behalf of the Party: attended various Communist Party conventions, picketed, handed out literature, worked at rallies and signed nominating petitions.* The record is devoid of evidence, however, that petitioner was aware that the Party was engaged in any kind of criminal activity. His uncontroverted testimony that he had never heard of any espionage, sabotage or any other form of unlawful or violent activity being undertaken by the Party while he was a member (R. 307-08; J.A. 83a) is confirmed by the testimony of the chief Government witness that such activities were "completely separate and apart from the political structure" of the Party (R. 264; J.A. 41a).

2. *Petitioner's testimony relating to his knowledge of the Party's aims and to whether he would have participated*

* The Commandant also relied, in part, on petitioner's past affiliation with the International Workers Order and the American Labor Party and his signing in 1957 a Peoples Rights Party nominating petition (R. 232; J.A. 30a, 31a). There is, however, no evidence that petitioner was aware that any of these organizations engaged in illegal conduct or had illegal objectives—or, indeed, that any of these groups did engage in espionage, sabotage or advocacy of illegal activity.

in a revolution. Petitioner did state that he was aware that the Communist Party advocated the overthrow of the present form of Government (R. 312; J.A. 87a).* There is, however, no testimony that petitioner was himself committed to the overthrow of the Government. Petitioner refused to concede that he would, while a member, have participated in a revolution. But petitioner strongly affirmed that he would now fight against the Communists (R. 312; J.A. 88a). Moreover, his uncontradicted testimony was that had the Party given him "a job like sabotage I wouldn't have joined the party. I wouldn't do it" (R. 324; J.A. 100a).

3. *Attendance at Communist schools and summer camps.* Petitioner attended the Jefferson School for four or five weeks in the late thirties where he took a course on "the principles of Marxism and Leninism and the Negro question. . . ." (R. 309, 310; J.A. 85a). The only evidence relating to the nature of instruction at the Jefferson School is petitioner's testimony. He declared that no revolutionary tactics were taught him (R. 322; J.A. 98a); that he could not absorb Marxism or Leninism (R. 310; J.A. 86a); knew only that Marxism dealt with the "equality of man" and "was against capitalism" and that it assumed that Socialism would eventually take over and that there would be a bloodless revolution (R. 318; J.A. 94a). Even had he understood the principles of Marxism and Leninism, this would not suffice to show that he subscribed to these

* It is far from clear that petitioner understood that the overthrow was to be accomplished by violent means: he stated that he was taught at the Jefferson School that "there would be a bloodless revolution" (R. 318; J.A. 94a). Other than this single record reference to a nonviolent change of government, there is nothing in the record which indicates when petitioner acquired knowledge of the Party's advocacy of overthrow.

principles, or would be willing to engage in criminal conduct to bring about the realization of a Communist state.

Petitioner also spent brief periods at Camps Midvale and Unity (R. 317, 360; J.A. 93a, 127a). Since, however, the record is totally devoid of any evidence that the Party's illegal objectives or tactics were taught at these camps, it can hardly be inferred that petitioner's brief attendance at them made him aware of these tactics or objectives.

4. *Petitioner's failure to disclose membership on his original application.* Although petitioner disclosed membership in the International Workers Order (R. 349a-350a; J.A. 119a-121a) he failed to reveal his former membership in the Communist Party in his original application. The Commandant evidently did not consider this omission significant, for he did not mention it in his findings (see R. 231-33; J.A. 29a-34a). Since the regulations do not make the failure to declare membership in listed organizations a ground for denial of special validation, it is not apparent what significance petitioner's failure to disclose membership in the Communist Party could have except insofar as it may reflect upon his credibility. Certainly a nondisclosure is not itself evidence of a commitment to any objective—much less of a specific intent to bring about the violent overthrow of the Government.

To infer a specific intent to advance the illegal objectives of the Communist Party from evidence which relates solely to participation—no matter how substantial—in activities in support of the lawful objectives of the Party is no different from making participation in the lawful activities of the Party a ground for exclusion. There is no evidence connecting petitioner with those illegal objectives

and activities of the Communist Party which might permit an inference that he was likely to engage in espionage or sabotage. The Commandant's decision, therefore, is arbitrary and abridges petitioner's freedom of speech, assembly and association by punishing him for engaging in constitutionally protected activities.

Moreover, in basing its decision upon a finding that there was evidence that petitioner "realized, accepted, and approved" the illegal objectives of the Communist Party, the court below applied a different and lesser standard of proof than that required by decisions of this Court—evidence of a specific intent to advance the illegal objectives of the Party. The court below distinguished *Elfbrandt* v. *Russell, supra,* as involving "interpretation of criminal statutes, and the specific intent necessary for a constitutionally based conviction." 369 F. 2d at 68. It contrasted what it viewed as the issue in the present case: "... the reasonableness of regulation of employment in a peculiarly sensitive area of those who are knowing members and the nature of whose membership make it likely that their presence would be inimical to the United States." *Id.* at 68-69.

The court below treated *Elfbrandt* v. *Russell* as turning upon the fact that knowing members of the Communist Party who took the Arizona oath were subject to criminal prosecution for perjury as well as discharge. This distinction became untenable with this Court's recent decision in *Keyishian* v. *Board of Regents, supra,* which had nothing to do with criminal prosecutions.

II

This case also presents the serious question of whether the regulations upon which the merchant seaman screening program is based are unconstitutionally vague. Questions of vagueness assume particular importance in the context of a program which, like the one here, subjects individuals to exclusion from a field of employment because of their beliefs and associations. See, *e.g.*, *Keyishian* v. *Board of Regents*, —— U. S. ——, 35 U. S. L. Week 4152 (Jan. 23, 1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

The basic regulation upon which the Commandant's decision rests requires the Commandant to determine whether he is satisfied that the applicant's presence on shipboard would not be "inimical" to the security of the United States. 33 C. F. R. § 6.10-1. "Inimical" left undefined is no more precise than the terms "seditious" and "treasonable" which this Court only recently characterized as "dangerously uncertain." *Keyishian* v. *Board of Regents, supra*, 35 U. S. L. Week at 4154.

As used in these regulations "inimical" is defined further only by 33 C. F. R. § 121.03 which requires that the Commandant's decision be based on five kinds of information—only the last of which is involved in this case:

> "(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended."

This "definition" compounds rather than removes the ambiguity of the basic standard. It does not provide that

membership in a listed organization is sufficient to exclude the member from employment. Nor does it contain any hint of criteria to be employed in determining when an applicant's relation to a listed organization demonstrates that his employment would be inimical to the security of the United States. It is impossible to tell from this regulation whether only knowing members of listed organizations are barred from employment.

This, however, is but one of many questions which the vague regulations leave unanswered. For instance, does one who is aware that the Communist Party advocates the overthrow of the government, but who disagrees with this objective, come within the ban of the regulation? Does the regulation exclude from employment all knowing members, including those whose only connection with the Party is the payment of dues, or does it reach only active members? If only active membership is covered, what nature of activities permits denial of special validation? Must there be a showing that the applicant is linked with the Party's illegal activities? Or is it sufficient that he engages in such lawful political activities as passing out Party literature supporting legislation to end racial discrimination?

The court below held that the vagueness of these regulations was removed by the Commandant's construction of the regulation as requiring knowing membership. Here as in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 511 n. 9 (1964), there is nothing in the language or history of the regulation to support such a construction. Even assuming a basis for so construing the regulation, however, the many other ambiguities set out above remain.

The regulation suffers from still another ambiguity. The Commandant is directed to consider not only membership

in but also "sympathetic association" with listed organizations. The Commandant based his decision in part on a finding that between 1957 and 1960 petitioner was "a member of, or knowingly and sympathetically associated and affiliated with" the Communist Party (R. 232, J.A. 31a). Even if construed as affecting only those in knowing sympathetic association with the Communist Party this phrase is so lacking in precision as to permit exclusion from employment as a merchant seaman for an undefined variety of "guiltless knowing behavior." *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-287 (1961). A person could be said to associate himself with the Communist Party in a "sympathetic" manner if, with knowledge of the illegal purposes of the Party, he endorses or supports Communist candidates for public office; if he defends the constitutional rights of the Communist Party or its members; indeed, if he supports any cause which is likewise supported by Communists or the Communist Party. See *Baggett* v. *Bullitt, supra; Cramp* v. *Board of Public Instruction, supra.*

III

Another serious and unresolved question is whether Congress has authorized the creation of the merchant seaman screening program. The importance of this question is emphasized both by the sweep of this program and by its impact upon the exercise of First Amendment rights.

Neither the purported statutory authority for the program, the Magnuson Act,* nor its legislative history** con-

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* 64 Stat. 427 (1950), 50 U. S. C. § 191 (1964).

** S. Rep. No. 2118, 81st Cong., 2d Sess. (1950); H. R. Rep. No. 2740, 81st Cong., 2d Sess. (1950); 96 Cong. Rec. 10794-98, 11220-21, 11321-22 (1950).

tain any reference to a personnel screening program. Rather the Act gives the President blanket authority to issue rules and regulations to safeguard vessels, harbors, ports and waterfront facilities against destruction by subversive acts. Language no less broad might well suffice to authorize an administrative program regulating a phase of the economy. But only the clearest Congressional authorization may support a program which like that here restrains an individual's liberty and brands him a "security risk" on the basis of his beliefs and associations. See *Kent* v. *Dulles,* 357 U. S. 116 (1958); cf. *Cole* v. *Young,* 351 U. S. 536, 546-47 (1956).

Even if Congress had authorized the creation of a personnel screening program, a serious question would remain whether Congress intended to authorize a program which departs so substantially from traditional norms of fair procedure:

(1) There is no appeal from a decision of an examiner or hearing board to the Commandant, or from the Commandant to some higher authority. To the contrary, although the regulations prescribe four separate decisions of the same issue, all four decisions are to be made by the same person: the Commandant. Compare *Cole* v. *Young, supra.*

(2) Although the Commandant's decision at each stage is made with the benefit of recommendations and an analysis of the evidence, as the regulations are administered the applicant has no opportunity to know what these recommendations are. That the recommendations are only advisory does not detract from an applicant's need to know the arguments he must counter and to have an opportunity

to rebut them. See *Gonzales* v. *United States,* 348 U. S. 407, 415 (1955).

(3) Even had petitioner been aware of the recommendations, he would have had no opportunity to rebut them. Despite the fact that the Commandant is the only person empowered to grant the application, the regulations afford no opportunity to submit arguments, written or oral, directly to the Commandant.

It is well settled in security clearance cases that in the absence of clear Congressional authorization it will not be inferred that Congress intended to authorize a Government agency to dispense with traditional forms of fair procedure. *Cole* v. *Young,* 351 U. S. 536 (1956); *cf. Greene* v. *McElroy,* 360 U. S. 474 (1959).

CONCLUSION

For the reasons stated the writ should be granted.

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